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IN THE
COURT OF APPEALS OF INDIANA

MACARTHUR DRAKE, LINDA DRAKE, et al,	)	
Appellants-Defendants,	)	
vs.	)	No. 45A04-0607-CV-361
FIFTH THIRD BANK AS SUCCESSOR IN INTEREST TO FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable George Ivancevich, Magistrate
Cause No. 45C01-0301-MF-14

April 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Macarthur Drake and Linda Drake ("the Drakes") appeal the trial court's order granting summary judgment to Fifth Third Bank ("Fifth Third") on its complaint to foreclose.

We reverse.

ISSUE

Whether the trial court erred in granting Fifth Third's motion for summary judgment.

FACTS

On March 13, 1971, Charles Hard and Thelma Hard entered into a mortgage agreement with First Federal Savings and Loan Association of Gary ("First S. & L.") for a debt of $26,350, evidenced by a promissory note of the same date, to be repaid over thirty years at 7.5% annual interest in monthly installments of $184.45 and secured by real estate at Lot 314, Robert Bartlett's Marquette Park Estates First Addition ("the real estate"), in the City of Gary.

On January 25, 1989, Thelma Hard conveyed the real estate by warranty deed to the Drakes, subject to the above mortgage of First S. & L., which the Drakes "agree[d] to assume and pay." (App. 177). Also on January 25, 1989, the Drakes entered into agreement ("assumption agreement") with Thelma Hard and First Federal Savings Bank of Indiana ("First Savings") -- "formerly known as" First S. & L. (App. 118). The assumption agreement stated that First Savings was the "holder of a promissory note" for $26,350.00 dated March 13, 1971 and covering the real estate. (App. 118). According to the assumption agreement, First Savings accepted the Drakes' assumption "on the

condition that [they] agree[d] to be responsible for the payment of the Note," the principal balance of which was $17,706.83, and "admit[ted] that the fee simple title" to the real estate was "encumbered by the [mortgage]." (App. 118).

On January 10, 2003, Fifth Third filed a complaint, alleging that the Drakes had failed to make the monthly payments, certain amounts were due from May 1, 1998 forward, and an order of foreclosure should be granted to it as successor in interest to First S. & L. On March 14, 2003, the Drakes filed a motion to dismiss for failure to state a claim upon which relief can be granted. The Drakes asserted that Fifth Third's complaint suffered from various procedural and factual deficiencies. They further asserted that the April 26, 2000, recording of an April 3, 2000, "satisfaction of mortgage" in the amount of $26,350.00 by Civitas Bank, f/k/a/ First S. & L., had discharged and released the Drakes' mortgage obligations "as a matter of law." (App. 126).

On March 20, 2003, Fifth Third moved for a hearing on the Drakes' motion and also filed a motion for leave to amend its complaint. On June 23, 2003, the trial court granted Fifth Third leave to amend its complaint. On July 9, 2003, Fifth Third filed its amended complaint. The amended complaint again sought foreclosure, alleging that the Drakes owed $6,717.54 plus interest, late fees, court costs and expenses. The amended complaint contained exhibits that included the assumption agreement signed by the Drakes; the 1971 mortgage secured by the real estate; the warranty deed conveying the real estate from Thelma Hard to the Drakes; notices of federal tax liens on the real estate; an affidavit from an employee of Civitas Bank (f/k/a First S. & L.) stating that the original promissory note had been lost or misplaced; and an affidavit by an employee of

Fifth Third stating that the mortgage on the real estate had been wrongfully released, that Fifth Third was the holder and payee of the note assumed by the Drakes, and that $6,717.54, plus interest, fees, court costs and expenses was due and owing; and a certificate of merger from the Indiana Secretary of State indicating that Fifth Third Bank, Indiana and Civitas Bank had merged on March 17, 2000, with Civitas being the surviving entity.

On September 25, 2003, the Drakes filed another motion to dismiss. They moved that the complaint be dismissed with prejudice for its failure to state a claim upon which relief can be granted and "for findings of fact and conclusions of law regarding said motion." (App. 184). The Drakes again argued various procedural and factual deficiencies, that the recorded satisfaction of mortgage was dispositive, and that Fifth Third lacked standing to bring the action.[1]

On October 10, 2003, the trial court held a hearing on the motion and heard argument by counsel. No evidence was submitted. Fifth Third argued that it "believed that" the Drakes were in default on the mortgage and "that the release was wrongful, . . . a mistake"; while the Drakes "believe[d] they don't owe the money"; therefore, this was "an issue for trial, . . . an issue to present to the Court in a trial with witnesses to determine whether or not the money was owed." (Tr. 21, 22). Fifth Third asserted that at

[1] Drakes asserted that Fifth Third could not enforce a promissory note when it did not include the note with its complaint as required by the trial rules. They asserted that Fifth Third failed to provide "necessary documentation" that it was the successor in interest to First S. & L. (App. 187). The Drakes submitted a certified copy of the recorded document "reflecting a full satisfaction and release of mortgage," (App. 186), and asserted that the affidavit by the Fifth Third employee stating that the mortgage was wrongfully released contained a date other than that reflected by the recorded release of the Drakes' mortgage.

trial, it "would present [its] witnesses to give a complete account to this Court which is proper to determine whether or not every dime of that note has been paid." (Tr. 22). Fifth Third also noted that at trial, its burden would be to establish "by a preponderance of the evidence" that "the Drakes owe[d] the money that [it said] they owe[d] and . . . that [Fifth Third] [wa]s entitled to foreclose on the property." *Id.*

On December 19, 2003, the trial court issued its order, which stated that Fifth Third was "the property [sic] entity to bring" the instant foreclosure action and denied the Drakes' motion to dismiss. (App. 25). The order also contained numerous findings,[2] such as:

- Fifth Third had acquired both First S. & L., and Civitas' predecessor.
- The Drakes "violated the terms of the assumption agreement and the terms of the mortgage and a default occurred," resulting in their owing "an unpaid balance in the sum of $6,714.54, plus . . . . from the 1st day of May, 1998, through October 7, 2003 . . ."
- They "violated the terms of the assumption agreement and terms of the mortgage by failing to pay real estate taxes due and owing since 1997 payable 1998 and each year thereafter", which forced Fifth Third "to advance monies for real estate taxes in the amount of $8,998.20 in order to protect" its security interest.
- The Drakes "violated the assumption agreement by failing to maintain insurance on the mortgaged premises"; forcing Fifth Third "to maintain hazard insurance" and "advance[] the sum of $2,534.00 in order to keep the premises insured."
- Fifth Third had "mistakenly filed a Satisfaction of Mortgage due to an internal accounting error" and subsequently filed and recorded an affidavit of wrongful release of mortgage.

[2] As noted in Fifth Third's brief, and by the trial court at a subsequent hearing, the Drakes' motion to dismiss had expressly asked the trial court to make findings pursuant to Indiana Trial Rule 52(A).

- The Drakes had "basically been living for free for the past five (5) years all to the detriment of" Fifth Third, which "free living . . . smacks of unjust enrichment" such that Fifth Third "should be allowed to protect its interest and continue the foreclosure process . . . ."

(App. 24 – 25).

On March 3, 2004, the Drakes filed a motion to reconsider and to strike extraneous findings as to facts not alleged in Fifth Third's complaint. Their accompanying memorandum noted, *inter alia*, that the finding as to Fifth Third surviving its merger with Civitas was contrary to Fifth Third's own evidentiary submission. Also on March 3rd, the Drakes filed another motion to dismiss, this time arguing that the trial court lacked subject matter jurisdiction because Fifth Third had failed to establish that it was a true party in interest, a successor to First S. & L.

On March 15, 2004, Fifth Third filed a motion for summary judgment, asserting that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. In addition, therewith, Fifth Third's motion stated that it had attached an affidavit, and it argued in its brief that the affidavit "establishe[d]" both "delinquent payments" on the note and "the balance due and owing" to pay the note. (App. 229).

On April 12, 2004, the Drakes filed a "Motion to Strike and/or Refuse" Fifth Third's motion for summary judgment. (Tr. 231). The Drakes argued that no affidavit had been attached to Fifth Third's motion,[3] and that the motion was premature because discovery had not yet taken place. On June 3, 2004, the Drakes filed their response in

[3] The Drakes' Appendix does not contain an affidavit with the motion for summary judgment, and Fifth Third did not submit its own Appendix with such a document.

opposition to Fifth Third's motion for summary judgment, and they submitted affidavits stating that they had "paid the full balance of the mortgage which they assumed from Thelma and Charles Hard." (App. 256).

On July 15, 2004, the trial court held a hearing, at which time it was agreed that discovery would proceed. On December 2, 2005, the trial court held a hearing on the summary judgment motion. Fifth Third was given an additional thirty days in which to file documentation of its status as successor in interest to First S. & L. On January 4, 2006, Fifth Third filed an affidavit with attached documents in that regard. On February 10, 2006, the Drakes filed their answer of general denial and affirmative defenses.

On May 5, 2006, the trial court issued its order granting Fifth Third's motion for summary judgment. The trial court found that Fifth Third "ha[d] standing to bring" the foreclosure action, that there were "no issues as to material fact," and that Fifth Third was "entitled to judgment as a matter of law." (App. 21).

DECISION

The Drakes press challenges to various actions of the trial court; however, we find one to be dispositive: whether the trial court erred in granting summary judgment to Fifth Third. We also state at the outset that the various pleadings, motions, and briefs filed with the trial court created a tortuous tangle – both procedurally and with respect to conflicting and/or misstated factual assertions. Moreover, by asking the trial court for findings of fact when it ruled on their motion to dismiss, the Drakes themselves triggered the production of findings that they now contest. Nevertheless, we cannot turn a blind

eye to the proper scope of trial court review for a motion to dismiss for failure to state a claim and the ultimate question of whether summary judgment was erroneously granted.

A motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim, not the facts supporting it. *Godby v. Whitehead*, 837 N.E.2d 146, 149 (Ind. Ct. App. 2006), *trans. denied*. When we review the trial court's determination on such a motion to dismiss, "we look only to the complaint and may not resort to any other evidence in the record." *Id.*

As the Drakes argued to the trial court, and as is clear from the findings enumerated above, many of the factual findings contained in the order denying the Drakes' motion to dismiss were not facts stated in the complaint. Fifth Third reminds us that a motion to dismiss will be considered one for summary judgment when a party submits evidence, *see* Ind. Trial Rule 12(b)(8), *Allbery v. Parkmore Drug, Inc.*, 834 N.E.2d 199, 201 n.2 (Ind. Ct. App. 2005), and that the Drakes did submit evidence with their motion to dismiss. However, that evidence was the satisfaction of the mortgage document executed on April 3, 2000, by the Civitas officer and recorded on April 26, 2000. As such, it did not establish the facts found by the trial court in its order.

That said, we turn to the order granting summary judgment, and what such an order requires. Our standard of review is the same as that used by the trial court: summary judgment is appropriate only where the designated evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Corr v. American Family Ins.*, 767 N.E.2d 535, 537 (Ind. 2002). The moving party bears the burden of making a *prima facie* showing that there are no genuine issues

of material fact and that there is an entitlement to judgment as a matter of law. *Hammock v. Red Gold, Inc.*, 784 N.E.2d 495, 498 (Ind. Ct. App. 2003), *trans. denied*. If the moving party meets these requirements, the burden then shifts to the nonmovant to establish genuine issues of material fact for trial. *Id.*

In support of its motion for summary judgment, Fifth Third designated the amended complaint and its attachments. Therein were sworn assertions that the document evidencing the satisfaction of mortgage obligations assumed by the Drakes had been mistakenly executed and recorded by the corporate predecessor to Fifth Third, and that the Drakes had defaulted on the assumed mortgage obligations. Therefore, after Fifth Third made this *prima facie* showing, the burden shifted to the Drakes. The evidence designated by the Drakes was that they had fulfilled their obligations, had "paid the full balance" thereof, *i.e.*, that the satisfaction of mortgage release was not a mistake. (App. 256). Accordingly, the evidence before the trial court seems to have established a genuine issue of material fact – as was so presciently argued by Fifth Third at the hearing on the motion to dismiss more than two years earlier.

Fifth Third reminds us that "findings of fact are typically reviewed for clear error, and are clearly erroneous when the record lacks any reasonable inferences supporting them." Fifth Third's Br. 11 (citing *Horseman v. Keller*, 841 N.E.2d 164, 169 (Ind. 2006)). However, such a standard cannot overlook the absence of any evidence whatsoever in the record to support a number of the trial's factual findings. Moreover, although the "trial court's grant of summary judgment is 'clothed with a presumption of validity,'" *Rosi v. Business Furniture Corp.*, 615 N.E.2d 431, 434 (Ind. 1993) (quoting

Department of Revenue v. Caylor-Nickel Clinic, 587 N.E.2d 1311, 1313 (Ind. 1992)), we believe that such a determination is also clothed with the presumption that it is made in accordance with the designated evidence.

We have said that "even if the trial court believes that the nonmoving party will not prevail at trial, it may not enter summary judgment where material facts conflict or conflicting inferences arise from undisputed facts." *May v. Frauhiger*, 716 N.E.2d 591, 594 (Ind. Ct. App. 1999). As Fifth Third previously argued, evidence needed yet to be presented to resolve the issue of whether the Drakes had satisfied the mortgage obligations that they assumed in the assumption agreement. Because this remains a disputed material fact, and conflicting inferences may arise from the execution and recording of the satisfaction of mortgage, summary judgment was improvidently granted.

Reversed.

BAKER, C.J., and ROBB, J., concur.